SUPREME COURT, U. S.

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No. 473

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

JOHN H. BINGLER,
District Director of Internal Revenue,
Petitioner

v.

RICHARD E. JOHNSON, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether an employer may make a scholarship grant to an employee (who is a degree candidate at an educational institution) which may be excludible from gross income under Section 117 of the Internal Revenue Code of 1954 without the necessity of establishing such grant as a gift.

STATEMENT

This is an income tax case. At issue is what is a scholarship excludible under Section 117 of the Code. More specifically, the issue is "Does a scholarship lose its tax-exempt status under Section 117 if (1) the grantor of the scholarship has a motive of self-interest in making it available, or

(2) there is any indicia of compensation surrounding the grant of the scholarship." The Third Circuit says "No"; the Fifth and Sixth Circuits say "Yes".

Respondents were employees of Westinghouse Electric Corporation at its Bettis Atomic Power Laboratory. Each had a degree from an accredited college in engineering. (Tr. 35, 76, 158, App. 10, 25, 43)

Westinghouse had initiated a doctoral program which provided employees of the company with the opportunity of securing the degree of Doctor of Philosophy in Engineering and Science at either the University of Pittsburgh or Carnegie Institute of Technology (now Carnegie-Mellon University). (Plaintiffs' Exhibit 2, App. 99, Tr. 33, App. 9) The existing requirements of the respective universities for the granting of the degree were not changed. (Tr. 136, 183, App. 40, 51)

During the first four years under the program, the respondents devoted 32 hours per week on their regular work assignments for Westinghouse and attended classes at either Carnegie Tech or Pitt for the other eight hours as regularly enrolled students. (Plaintiffs' Exhibit 2, App. 99, Tr. 40, 80, 161, App. 13, 26, 44) During this period, each respondent was paid his full salary as an engineer at Westinghouse on which income tax was paid and which is not in issue. (Tr. 40, 161, App. 13, 45)

During the fifth year (having satisfactorily completed the scholastic requirements of the respective universities to proceed) each respondent was granted an educational leave of absence of nine to twelve months from his employment (Tr. 30, 31, App. 7, 8) to allow him time to conduct research and to write and defend a thesis topic (Plaintiffs' Exhibit 2) as required by the universities for the granting of the degree. During this leave period, the respondents had no duties and performed no services for Westinghouse, all of their time being devoted to their research and thesis topic at the respective universities. (Tr. 53, 101, 164, App. 18, 32, 46)

As part of the doctoral program, Westinghouse gave each of the respondents "an educational stipend" during the leave period which was a percentage of his monthly salary based on his marital status and size of family with a maximum limitation as follows (Plaintiffs' Exhibit 2, App. 106):

Marital Status	Percent of Salary	Maximum
Single	70%	$490.00
Married	80%	$560.00
Married with one child	85%	$595.00
Married with two or more children	90%	$630.00

Westinghouse also paid the cost of tuition, books, fees, etc.[1] Before going on educational leave, each respondent agreed that he would return to Westinghouse at the end of the leave period and remain in the employ of Westinghouse for at least two years[2] thereafter at a salary commensurate with the duties assigned. (Tr. 32, 33; App. 8, 9)

The requirements of the respective universities for the granting of the degree of Doctor of Philosophy required that the particular thesis topic to be researched and defended qualify as original research. (Tr. 137, 187, App. 40, 52) The selection of a particular topic was a matter of collaboration between the student and his faculty advisor (Tr. 138, 185, App. 40, 51) because the faculty advisor had to be satisfied that the topic had not theretofore been researched and would meet the approval of the university as original research for the granting of the degree. (Tr. 139, 187, App. 40, 52) After selection of the thesis topic and approval by the university, the topic was submitted to Westinghouse and the Atomic Energy Commission for approval. (Tr. 48, 128, App. 17, 38)

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[1]Income tax was withheld from the educational stipends but not from the payments made for tuition, books, fees, etc. (Tr. 313, App. 84)

[2]Wolfe was not asked to sign an agreement but was informed that he was expected to return to his employment for a period at least equivalent to his leave period. (Tr. 33, App. 9)

Each of the respondents selected, researched, wrote and defended such a thesis after which the written article became a part of the library of the respective university and available to the public generally. (Tr. 52, 111, 144, App. 18, 34) The research results were of no direct value to Westinghouse and the government neither contended nor offered proof to the contrary.[3]

During the entire doctoral program, respondents were enrolled as students at the respective universities in the same manner (Tr. 38, 80, 160, App. 12, 26, 44) and were required to meet the same scholastic standards for the degree as other graduate students. (Tr. 142, App. 41) Westinghouse had no control of the educational program other than in supplying funds to make it available. (Plaintiffs' Exhibit 2, App. 99, Tr. 136, 154, App. 40, 42)

Claims for refund of the tax withheld from the educational stipends were filed with and rejected by the Internal Revenue Service and suit was filed.

The trial of the case before a jury in the District Court evolved into an issue of law, rather than an issue of fact, the government contending that Westinghouse had a motive of self-interest in making the scholarship available by using it to attract engineering personnel to its employ and that such motive precluded tax exemption for the scholarship; the respondents contending that evidence of such self-interest and of compensation generally was irrelevant in determining a scholarship under Section 117.

After admitting evidence in support of both contentions, the trial court then instructed the jury on the respective contentions of the parties (Tr. 428, 431, 432, App. 89, 90,

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[3]Significantly, respondent Johnson had selected and researched a thesis topic during his leave period in 1961 which he abandoned before completion because of the lack of time and equipment. (Tr. 98, App. 31) He selected another thesis topic which he successfully pursued after termination of the leave period and for which he was granted the degree of Doctor of Philosophy in 1965. (Tr. 103, App. 33) Westinghouse did not continue the original 1961 research project abandoned by Johnson. (Tr. 316, App. 85)

91) and allowed the jury to select the applicable law with an equivocal interrogatory:

> "Were the amounts received by [respondents] from Westinghouse a scholarship at an educational institution excludible from gross income?" (Tr. 428, App. 89)

which was answered in the negative by the jury.

The Court of Appeals for the Third Circuit reversed, stating that the issue should not have been submitted to the jury and that

> "In the light of the aim explicit in the legislative history of doing away with the touchstone of compensation vs. gift, we cannot say, as one Court has, that 'indicia of compensation' such as are suggested by the regulation are legitimate criteria for testing the excludibility of an alleged scholarship. . . . Nor can we even approve the disqualification . . . of amounts which represent 'compensation for past, present, or future employment services' without more. . . . This ruling seems merely an attempt to write into the regulations a concept which was considered and intentionally rejected by the Congress which enacted the Code. (Slip Op., App. 124)
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> * * * * *
>
> "In the light of this overriding congressional goal of encouraging scholarship aid and the accompanying lack of restrictions as to its amount or character in the case of degree candidates, we believe, upon due consideration, the appellants' educational grants do qualify for income tax purposes as excludible scholarships or fellowship grants." (Slip Op., App. 129)

The government sought certiorari because the decision of the Third Circuit is in conflict with the decisions of *Ussery v. United States,* 296 F.2d 582 (C.A. 5) and *Stewart v. United States,* 363 F.2d 355 (C.A. 6) which disqualify the tax free status of a scholarship to a student who is a candidate for a degree at an educational institution where there is any "indicia of compensation" or where the educational stipend may be considered "compensation for past, present, or future employment services."

SUMMARY OF ARGUMENT

The government's argument is that a scholarship or fellowship grant which has "indicia of compensation" attached to it or which may be considered generically "compensation for services" is disqualified from tax-exempt status as a scholarship or fellowship under Section 117.

The taxpayers' argument is that Congress did not intend that the determination of a scholarship or fellowship grant be made by a reference to general considerations of "gross income" or "compensation for services".

Congress recognized that a scholarship or fellowship grant is gross income and compensation for services. However, it did not intend that such grants should be taxable but that they should be treated as tax-exempt within the limits provided in the Code.

Congress recognized that there is no middle ground between a gift and compensation in the format of the Internal Revenue Code in which a scholarship or fellowship may qualify exclusively. Admittedly, an educational grant is not a gift. Undeniably, it is compensation; and because it is, Congress did not intend that a scholarship or fellowship grant under Section 117 and an educational grant with indicia of compensation be mutually exclusive by definition. They can be and are one and the same.

So long as the amount paid is to enable the individual to pursue his education, it is (1) a scholarship if he is a student and a degree candidate at an educational institution, and (2) a fellowship if he is not a degree candidate but the grantor meets the qualifications of Section 117(b).

In other words, the comparison test of "gift *vs.* compensation" has been replaced by the curriculum standards of the educational institution in respect of scholarships and the tax-exempt status of the grantor and the amount and time limitation in respect of fellowships.

The provisions of Section 117 were intended by Congress as a means of limiting compensation in the form of a schol-

arship or fellowship grant entitled to tax-exempt status. Congress did not intend that a scholarship or fellowship grant must be completely free of "indicia of compensation" before it acquires tax-exempt status under Section 117.

ARGUMENT

A. CONGRESS DID NOT INTEND THAT A SCHOLARSHIP UNDER SECTION 117 BE DETERMINED BY REFERENCE TO GENERAL CONSIDERATIONS OF COMPENSATION

The 1939 Internal Revenue Code did not treat scholarships and fellowships specifically and such grants were includible in gross income unless the elements of a gift could be established. The House Committee, in formulating Section 117 of the 1954 Code, attempted to eliminate "the existing confusion as to whether such payments are to be treated as income or as gifts". (H. Rep. No. 1337, 83d Cong., 2d Sess.) By Section 117, Congress sought to provide a "clearcut method of distinguishing between taxable and nontaxable grants" and to eliminate the necessity of deciding the tax status of these grants on a "case by case method". (H. Rep., supra)

A scholarship or fellowship grant is significantly different from a gift in that the latter (in addition to the proper motive) is an executed event while the former is an executory undertaking to use the grant for the recipient's education.

Implicitly, a scholarship or fellowship grant includes a promise to use the funds to further the education of the recipient and/or a condition that the payments shall terminate if they are not so used. Unless it is required that the amounts received be used to further the educational pursuits of the taxpayer, it cannot be said that they are amounts received as a scholarship or fellowship for purposes of Section 117. Revenue Ruling 65-58. With this promise or condition attached to a scholarship or fellowship grant, the payment does not qualify as a gift but is gross income. *Robertson v. United States*, 343 U.S. 711.

Because most grants originate with a corporate or governmental entity which has a motive or purpose in making the educational grant available, *Commissioner v. Ide*, 335 F.2d 852 (C.A. 3), it is unlikely that a grant can qualify as a gift made "out of affection, respect, admiration, charity or like impulses", *Robertson*, supra; or from a "detached and disinterested generosity", *Commissioner v. LoBue*, 351 U.S. 243, 246; or that the payment "proceeded primarily from generosity or charity, rather than from the incentive of anticipated economic benefit", *United States v. Kaiser*, 363 U.S. 299. Undoubtedly, educational grants are made by a grantor with "the incentive of anticipated benefit", *Bogardus v. Commissioner*, 302 U.S. 34, 41, precluding its tax status as a gift.

Therefore, a scholarship or fellowship grant is clearly "gross income" within the liberal definition given to this term by the courts "in recognition of the intention of Congress to tax all gains except those specifically exempted". *Commissioner v. Glenshaw Glass Company*, 348 U.S. 426, 430.

In the context of an employment relationship, any economic or financial benefit conferred on an employee, whatever the form or motive by which it is effected, is included within the term "gross income". And this benefit constitutes "compensation for personal services". *Commissioner v. LoBue*, supra, notwithstanding that the donor derived no economic benefit from it, *Robertson*, supra, or that the payment was entirely voluntary, *Old Colony Trust Company v. Commissioner*, 279 U.S. 716, 730. Therefore, a scholarship or fellowship grant to an employee constitutes compensation for services.

Recognizing that a scholarship or fellowship grant constitutes gross income, Congress provided for exceptions to the general definition of gross income under the 1954 Code:

> "Section 61 (1954 Code) GROSS INCOME DEFINED.
> (a) General Definition—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived . . ."

In commenting on the necessity for this provision in Section 61, the House Report states

> ". . . In view of the fact that certain types of income are excluded from gross income by other sections of the income tax subtitle of the new Code, Section 61(a) contains a clause excepting such income from the general definition of gross income."

Thus, the legislative history indicates that Congress intended that a scholarship or fellowship grant should not be determined by reference to gross income in the generic sense under Section 61. If it is a scholarship under Section 117, it is excludible from gross income even though it may generally constitute gross income under Section 61. By referring to the general concept of gross income or compensation for services in determining what is a scholarship, the whole purpose of Section 117 in providing a specific test is destroyed.

Because a scholarship or fellowship grant requires conduct on the part of the recipient, i.e., to undertake studies or research, such conduct on the part of the recipient is the "quid pro quo" for the grant. The grant then falls within the term "gross income" and can be labelled "compensation for services".

In addition, because a grantor has a purpose to be served in making the grant available, and the acceptance of the grant by the recipient helps fulfill that purpose, there is an "indicia of compensation" which attaches because the grantor benefits from the studies and research undertaken by the recipient under the grant.

Thus, "indicia of compensation" can be found in some form in every scholarship and fellowship grant; and using such comparison as a test to disqualify scholarships and fellowships from tax-exempt status under Section 117, as urged by the government and supported by *Ussery v. United States*, supra, and *Stewart v. United States*, supra, nullifies Section 117.

If the government's view is adopted, every educational grant would be taxable excepting only those grants which are favorably determined administratively on a case by case basis by the Treasury Department. A taxpayer's recourse to a court which follows *Ussery* and *Stewart* as to scholarships and *Duberstein* v. *United States*, 363 U.S. 278, as to gifts, would be fruitless.

It is clear that Congress considered the compensatory aspect of a grant "when the scholarships and fellowships are granted subject to the performance of teaching or research services", (H. Rep., supra) and specifically with respect to those individuals who are not candidates for a degree at an educational institution where the grants ". . . are in effect merely payments of a salary during a period while the recipient is on leave from his regular job." (H. Rep., supra) Congress also considered "research or teaching services in the nature of part-time employment required as a condition to receiving the scholarship or fellowship grant." (H. Rep., supra)

Congress realized that any economic or financial benefit conferred on an employee is "compensation for personal services". *Commissioner v. LoBue*, supra, and considered scholarships and fellowships in the light of "part-time employment" and "continuing salary payments". Had it so intended, Congress could have eliminated the tax exempt status of a scholarship or fellowship grant from an employer to an employee. The Congress, not having done so, the United States Court of Appeals for the Third Circuit is eminently correct in concluding that "indicia of compensation" as a test for the excludibility of a scholarship is "a concept which was considered and intentionally rejected by Congress . . ."

B. CONGRESS DID INTEND TO PROVIDE SEPARATE AND DISTINCT METHODS OF DETERMINING SCHOLARSHIPS AND FELLOWSHIPS EXCLUDIBLE UNDER SECTION 117.

The format of the Section 117 indicates a distinction between scholarships and fellowships excludible under Section 117. Excludible are (1) scholarships at an educational institution and (2) fellowship grants. No further definition of "scholarship" or "fellowship" is given in the statute but the terminology in the limitations in Section 117(b) relating to those who are candidates for a degree and those who are not candidates for a degree indicate that a scholarship refers to an individual who is a candidate for a degree at an educational institution and a fellowship as referring to an individual who is not a candidate for a degree whether or not at an educational institution.

An educational institution is defined in the Code (Section 151(e)(4)) as "only an educational institution which normally maintains a regular faculty and curriculum and normally has a regularly organized body of students in attendance at the place where its educational activities are carried on." The attendance of a student at an educational institution as a candidate for a degree is limited. He either satisfies the curriculum requirements for the degree and is graduated or he fails and/or drops out.

In making specific limitations as between those who are candidates for a degree and those who are not candidates for a degree, Congress must have concluded that in the case of a scholarship where the individual was a candidate for a degree at an educational institution, the requirements of the educational institution for the granting of that degree are a sufficient limitation and guideline to prevent the use of the scholarship grant as a substitute for a salary continuation beyond a reasonable period of time as measured by the time required to secure a degree.

With respect to a fellowship where the individual is not a candidate for a degree, recognizing that a research project

or program of study under a fellowship may have an indefinite duration, Congress placed the limitation of exclusion of 36 months at $300.00 per month with the further requirement that the grantor be government or a tax-exempt organization as defined.

In addition, the legislative history indicates Congress considered scholarships and fellowships separately.

The House report states that Section 117 "excludes from tax all grants to students at educational institutions. . ." and "in the case of individuals who are not candidates for degrees, the bill provides a specific standard to be used in determining whether the grant is in effect a salary payment". Throughout the legislative history, there is a clear distinction between and consideration of those who are candidates for a degree at an educational institution and those who are not candidates for a degree.

Moreover, the regulations promulgated by the Treasury Department in defining a "scholarship" and "fellowship" recognize a distinction between a scholarship and fellowship grant.

> "Regulation Section 1.117-3 Definitions. (a) Scholarship. A scholarship generally means an amount paid or allowed to, or for the benefit of, a *student*, whether an undergraduate or a graduate, to aid such individual in pursuing his studies. . . ."
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> * * * * *
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> "(c) Fellowship grant. A fellowship grant generally means an amount paid or allowed to, or for the benefit of, an *individual* to aid him in the pursuit of study or research. . . ."

A scholarship requires that the individual be a student at an educational institution and a candidate for a degree in which the student must meet the curriculum requirements of the educational institution for the granting of the degree. On the other hand, a fellowship does not require student status on the part of the individual, nor does it have curriculum requirements of an educational institution as a guideline.

The thrust of the respondents' argument is that scholarships and fellowships were separately considered and treated by Congress because Congress wished to place a limit on the amount of compensation in the nature of a scholarship and fellowship which may be excludible from gross income. Because of the differences between a scholarship and a fellowship as defined, separate limitations had to be provided with respect to each classification.

C. THE EDUCATIONAL STIPENDS RECEIVED BY THE RESPONDENTS QUALIFY AS SCHOLARSHIPS EXCLUDIBLE UNDER SECTION 117.

During his educational leave period, each respondent was a regularly enrolled student as a candidate for a degree at an educational institution which required for the granting of that degree that a research project be undertaken and a thesis written and defended. Living allowances were paid to the respondents to enable them to pursue this research. Therefore the definition of a scholarship under the regulations has been satisfied.

There is no issue as to benefit derived from the research undertaken. Westinghouse derived none directly. It did not request or require that a research project be undertaken by the respondents nor did it specify the particular topic to be researched. (Tr. 47, 84, App. 16, 28)

The government's argument that the living allowances paid to the respondents during their educational leave represent compensation for past, present or future employment services, or represent payment for services which are subject to the direction or supervision of the grantor is without merit.

Unless the term "compensation for past, present, or future employment services" is used in the generic sense of "gross income", this regulation (Section 1.117-4(c)) is inapplicable because each respondent was paid by Westinghouse at the going rate as an engineer for his services previous to

the educational leave. Each was also paid at the going rate as an enginer for his services subsequent to the educational leave, and during his educational leave, he rendered no services to or for the benefit of or subject to the direction or supervision of Westinghouse.

The government is using the term "compensation for services" in the sense that anything paid by an employer to an employee represents compensation for past, present or future services and, therefore, is taxable. This argument is a reversion to the generic sense of "gross income" and overrides the introductory clause of Section 61 of the Internal Revenue Code providing that gross income shall not include items specifically excepted under other sections of the Code. The argument of the government is plainly a reversion to the gift *vs.* compensation test.

The evidence offered by the government during the trial and now adverted to in its argument, of income tax withheld from the stipend, consideration of the respondents as employees during the educational leave period, the manner in which the stipends were recorded on the books of Westinghouse, etc., all establish the fact that there was an employer-employee relationship between Westinghouse and the respondents.

Congress did not intend to disqualify the tax-exempt status of a scholarship or fellowship grant from an employer to an employee. Had it so intended, it could have so provided specifically in the statute. Therefore, evidence tending to establish an employment relationship between the grantor and the recipient of an educational grant is irrelevant in determining the issue involved.

D. THE DECISIONS IN SUPPORT OF THE GOVERNMENT'S CONTENTION FRUSTRATE CONGRESSIONAL PURPOSE IN ENACTING SECTION 117 AND SHOULD NOT BE FOLLOWED.

The express purpose of Congress in enacting Section 117 was to eliminate the existing confusion as to whether scholarships or fellowships are to be treated as income or as gifts and to provide a clearcut method for such determination rather than a case by case method.

As Judge Tannenwald noted in *Elmer L. Reese, Jr.*, 45 T.C. 407, 412,

> "In the light of the decisions. . ., it is questionable whether Congress wholly succeeded in providing greater certainty in this area."

We suggest that this situation has arisen not so much from the statutory provisions but rather from a lack of clarity in the regulations in describing items not considered as scholarships or fellowship grants (Reg. Sec. 1.117-4). Regulations should be explicit and clear up uncertainty rather than create uncertainty. By disqualifying a scholarship if such amount represents either compensation for past, present or future employment services or represents payments for services which are subject to the direction or supervision of the grantor, without a further definition of "compensation for services", any employment relationship renders the scholarship taxable. *Commissioner v. LoBue*, supra. It is this general concept of "compensation" which has resulted in the decisions of *Ussery*, *Stewart* and *Reiffen*.

To disqualify the tax-exempt status of a scholarship if it is compensatory in the generic sense is a reversion to the "gift *vs.* income" test sought to be obviated by Congress. The phrase "compensation for services" as used in the regulation then becomes merely a misnomer for "gross income".

In *Ussery*, the taxpayer was a candidate for a degree at an educational institution with a scholarship furnished him by his employer. As in the present case, there was no issue

of uncompensated past or future services nor were there any services rendered during the educational leave. The degree sought was in the field of social work in which the taxpayer was then employed. In disqualifying the scholarship under Section 117 from tax-exempt status the court noted that

> "The terms 'scholarship' and 'fellowship' connote a purpose of assistance that stands in distinction to the self-interest of an employer in the compensation of his employee.
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> * * * * *
>
> "It is a fair inference that the terms 'scholarship' and 'fellowship' were used as opposed to a term such as 'compensation' and were carefully selected to bar cases where a payment is made for work primarily for the benefit of the grantor."

By requiring that the grantor of a scholarship have no motive of self-interest in making the grant available, necessarily the scholarship grantor must be motivated by a charitable or donative intent. And by considering "scholarship" as opposed to "compensation", the court, by misnomer, reverts to the gift *vs.* income test. *Ussery* is badly reasoned and should not be followed.

Similarly, *Stewart* follows *Ussery* and disqualifies the tax-exempt status of a scholarship to a student who was a candidate for a degree at an educational institution. The grantor of the scholarship was her employer and there was no issue that the taxpayer had rendered uncompensated services theretofore or thereafter for which the scholarship represented compensation. The recognition by her employer of her continued status as an employee during the educational leave period was held to be "such indicia of compensation for past, present, or future services as to make the scholarship stipends taxable". Without so stating, the court read further limitations into Section 117 by concluding that where an employment relationship, past or future, is involved between the grantor and the student, the educational grant

cannot qualify as a scholarship but represents taxable compensation for services.

The Court of Claims, as a trial court, in *Reiffen v. United States,* 376 F.2d 883, disqualified a scholarship to a student who was a degree candidate at Massachusetts Institute of Technology because his employer had given him the scholarship as part of a program in recruiting, training and retaining personnel. The court followed *Ussery* and *Stewart.*

However, compare *Reiffen* with *Lawrence E. Broniwitz,* 27 T.C.M. 1088 (decided September 30, 1968), in which the Tax Court held tax-exempt a scholarship to a student who was also a candidate for a degree at Massachusetts Institute of Technology. As in *Reiffen,* the scholarship had been given Broniwitz by his employer as part of his employer's recruiting program. After considering the "indicia of compensation" test of *Ussery* and *Stewart* and the rejection of such test by the United States Court of Appeals for the Third Circuit in this case, the Tax Court stated:

> "We believe that the approach of the Third Circuit in *Bingler* is the correct one, . . ."

The decision in *Reese v. Commissioner,* 373 F.2d 742, affirming the Tax Court, 45 T.C. 407, is not in conflict with the decision in this case. The taxpayer was a candidate for a degree at an educational institution in its teaching program. To secure the degree, she was required to engage in "internship teaching". In fulfilling this requirement, the taxpayer taught at a secondary school for which she received a salary from the school in accordance with the salary scale for other teachers at that school. The court held the amounts taxable, not because they had "indicia of compensation", but because the amount paid was not a scholarship, *i.e.*, it was not paid for the purpose of affording the taxpayer the opportunity to further her education. Rather, the amount was paid for the services actually rendered by the taxpayer as a teacher.

Woddail v. Commissioner, 321 F.2d 721 (C.A. 10), cited by the government as being in conflict with the present case is inapposite. Woddail was not a degree candidate at an educational institution and he actually rendered services which were of direct benefit to his grantor. The issue was whether the amount paid him was a fellowship under Section 117, not a scholarship at an educational institution.

CONCLUSION

It is submitted that this Court's adoption of the government's contention and the test of "indicia of compensation" in determining the excludibility of a scholarship or fellowship grant will continue the pre-1954 Code method of determining the tax status of a scholarship or fellowship grant on a case by case method, contrary to Congressional intention.

For over five years, the Internal Revenue Service has contemplated a revision of the regulations under Section 117. See *Revenue Ruling 65-146*, 1965-1 C.B.; *Revenue Ruling 65-59*, 1965-1 C.B. 67; *Revenue Ruling 63-250*, 1963-2 C.B. 79. Notwithstanding these expressed intentions, no clarification of the regulations has been published. Perhaps this is because there can be no clarification of the regulations in such a manner which would obviate the necessity of a case by case determination of what is a "scholarship *vs.* compensation". A comparison test necessarily requires a case by case determination in the same manner as the test of "gift *vs.* income". See *Duberstein*, supra. Furthermore, there can be no clarification in the description of what is a scholarship which would isolate it from the concept of "compensation for services" and yet not require it to meet the test of a "gift".

For these reasons, the conclusions of the United States Court of Appeals for the Third Circuit in this case should be sustained. This will provide a clearcut method of determining scholarships and fellowship grants as intended by Congress.

Respectfully submitted,

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